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# In the Supreme Court
## of the United States

OCTOBER TERM, 1947

No.....

WILLIAM RAY OLSEN,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.**

TO: The Honorable the Supreme Court of the United States:

Your petitioner, WILLIAM RAY OLSEN, respectfully petitions this Honorable Court for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause May 15, 1947, reversing the judgment of the United States District Court for the District of Oregon.

## SUMMARY STATEMENT OF THE MATTER INVOLVED

The private home of your petitioner was forcibly entered, and an article owned and kept in said home for the exclusive personal use of the occupants thereof was forcibly seized and removed by Government agents, purporting to act under the authority of the initial process of a warrant of seizure issued upon a libel of information filed under Sec. 304 of the Federal Food, Drug and Cosmetic Act (21 U.S.C.A. Sec. 334), wherein it was alleged, unsupported by proper verification, that the article had been shipped in interstate commerce, with accompanying false printed matter as to the curative value of the article for certain ailments.

The invasion of the home and the seizure of the article therefrom took place more than a month after the said article had come to final rest and use in the private home of its ultimate purchaser and user, with no intention of further resale, retransportation or use by others.

The article in question is a therapeutic device, concededly not inherently dangerous or harmful to anyone. Your petitioner and his mother, the purchasers and users thereof, have faith in the curative benefits of said device for the ailments from which they suffered, claimed to have been benefited by its use and are perfectly satisfied with it for the purpose for which it was purchased.

In order to present a clear cut issue of the important

legal and constitutional questions involved, your petitioner did not deny the allegations in the libel of information that at the time the article was shipped in interstate commerce it was accompanied by literature that contained some misleading and false statements as to the cures that could be effected by the machine. Your petitioner was more concerned with the preservation of the sanctity of his home, the protection of his property rights in said device and his right to self treatment in any manner he saw fit. Thus, the only issues involved at the trial of the case were the following:

*FIRST:* That the Government exceeded the powers vested in it under the Federal Food, Drug and Cosmetic Act in the following respects: (a) by unlawfully seizing a machine not inherently dangerous from the home of the ultimate purchaser and user long after the interstate transportation had ended and had come to a permanent rest, and while same was being kept and used by the purchaser for his own personal use with no intention of resale, retransportation or use by others, (b) by unlawfully seizing a machine not inherently dangerous from a private home in order that it might be condemned.

*SECOND:* That his constitutional rights were invaded in the following respects: (a) the right of privacy in the home, (b) the right of property in a machine which could be lawfully purchased and possessed and which was not inherently dangerous to him or to anyone else, and (c) the right of self treatment without Government interference, in other words, as so well

expressed by the late Justice Brandies "the right to be let alone".

The United States District Court for the District of Oregon upheld the contentions of the claimant and dismissed the libel. Its opinion is reported in the case of *United States v. One Article of Spectro-Chrome,* 66 Fed. Sup. 754.

Upon appeal, the decision of the District Court was reversed by the Circuit Court of Appeals; its opinion summarily disposing of these contentions by stating that they were "immaterial".

## QUESTIONS PRESENTED

1. Does the Constitutional grant to Congress of the power to regulate interstate commerce permit of a construction of Sec. 304 of the Federal Food, Drug and Cosmetic Act so as to authorize the seizure for condemnation of an article not inherently dangerous or harmful, from the home of the ultimate purchaser and user, long after the interstate character of the shipment had ended, and the article had found permanent lodgment and use in said home, without intention of resale, retransportation or use by others?

2. Conceding that the article at the time it was shipped in interstate commerce was misbranded, within the meaning of the Act, but that it was not inherently dangerous or harmful to anyone, and, it was not unlawful to own and possess same, does not its seizure for

condemnation, from the private home of the owner and user, on initial process of warrant of seizure, issued upon a libel of information, unsupported by proper verification, violate the constitutional rights of said owner and user, to-wit: (a) the right of privacy in the home, (b) the right of property in the machine, and (c) the right of self treatment or the right to be "let alone"?

## REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The Circuit Court of Appeals has decided an important question of statutory construction of a Federal law in violation of constitutional limitations, and in such a way as to violate the constitutional rights of your petitioner.

2. The questions at issue are of general importance and public interest. The precise points involved have not been but should be settled by this court. If the decision of the Circuit Court of Appeals is permitted to stand, it will encourage and authorize the forcible entry into thousands of homes and the seizure therefrom of countless kinds and varieties of drugs, devices and cosmetics, acquired for personal use and not inherently dangerous or harmful, if any of said drugs, devices or cosmetics had at some time in the far distance past been shipped in interstate commerce, accompanied by printed matter containing any exaggerated or misleading claims as to their therapeutic or curative benefits.

3. The decision of the Circuit Court of Appeals, in effect, holding that once an article is shipped in interstate commerce, in violation of the Federal Food, Drug and Cosmetic Act, it is *never* immune from pursuit, regardless as to where it may be found and regardless that the article is not inherently dangerous or harmful and is kept for personal use only and not for sale or transportation, is contrary to law, does violence to Article 1, Section 8, and the Fourth and Fifth Amendments of the United States Constitution; is at variance with its own decisions and is in conflict with the decisions of other Federal Courts.

4. No court had heretofore sanctioned the forcible entry of a private home and the seizure of the occupant's property therefrom, in order to condemn same.

## JURISDICTIONAL STATEMENTS

The jurisdiction of this court is invoked under Sec. 240 of the Judiciary Act as amended (28 U.S.C.A. 347). The Circuit Court of Appeals for the Ninth Circuit has in this case decided an important question of Federal Constitutional rights and of construction of Federal Laws which have not been, but should be, settled by this court.

Judgment was entered in this case by the United States Circuit Court of Appeals on May 15, 1947.

## PRAYER FOR WRIT

WHEREFORE your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directing the United States Circuit Court of Appeals for the Ninth Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said court had in the case numbered and entitled on the docket "No. 11,403—United States of America, Appellant v. William Ray Olsen, Claimant and One Article of Device labelled in part Spectro-Chrome, Appellee", to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States, and that the judgment herein of the said United States Circuit Court of Appeals for the Ninth Circuit be reversed by this Court, and for such other relief as to this court may seem proper.

DATED this 21st day of July, 1947.

WILLIAM RAY OLSEN, Petitioner,
By Barnett H. Goldstein,
1225 Failing Building,
Portland, Oregon,
Attorney for Petitioner.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### OPINIONS IN COURTS BELOW

The opinion of the District Court is reported in *U. S. v. One Article of Spectro-Chrome,* 66 Fed. Sup. 754.

The Judgment of the Circuit Court of Appeals was entered on May 15, 1947. It is printed in full at R. 146-150.

### Point I

**The Circuit Court of Appeals erred in failing to so construe Sec. 304 of the Act so as to exclude from the scope of the words "at any time thereafter" proceedings against devices in the hands of the ultimate consumer after the interstate character of the shipment had ended.**

It was never contended by the claimant, as indicated in the opinion of the Circuit Court of Appeals that Sec. 304 of the Act (21 U.S.C.A. Sec. 334) was unconstitutional. It *was contended* that this section of the Act was inapplicable and that the Federal Government exceeded its powers under the law when it invoked same to break into the private home of the ultimate consumer after the interstate character of the shipment had ended.

The Government's contention, in effect, is that under the law, as it construes it, the impress of interstate commerce when once acquired is never removed, but like Tennyson's Brook "goes on forever". In brief, that the article is *never* immune from pursuit and seizure by the Federal Authorities, wheresoever it may be found!

Even if the statute could be so construed it would nevertheless clearly exceed the powers granted to the Federal Government by the Commerce clause of the Constitution. (Article 1, Section 8).

The present holding of the Circuit Court of Appeals that it is immaterial that the article at the time of its seizure was not in interstate commerce and that it was in the home of the ultimate purchaser and user, but that it could be proceeded against at any time, if it had been misbranded while in interstate commerce, is at variance with the decisions of this court in *Shechter v. U. S.*, 295 U.S. 495—97 A.L.R. 947, and with its own decision in the case of *U. S. v. Phelps Dodge Merc. Co.*, 157 Fed. (2d) 453, which held that libel proceedings under the Act could not be enforced against alleged adulterated food after it had come to rest in the consignee's warehouse, and its decision in the case of *Alberty v. U. S.*, 159 Fed. (2d) 275, which likewise recognized the necessity of fixing the termination of an interstate shipment.

In contrast to the opinion of the Circuit Court of Appeals for the Ninth Circuit in this case, is the recent

decision of the Circuit Court of Appeals for the Fifth Circuit; that of *Sullivan v. U. S.* decided on May 12, 1947, and not yet reported. In that case an attempt was made to hold a local retail druggist criminally responsible for the sale of certain drugs after the interstate character of the shipment had ended. In reversing the judgment of conviction Justice Sibley, speaking for the Court, said:

> "The attempt here made is to extend subsection (k) so as to make criminal all retail sales from the interstate package, though made clearly in intrastate commerce, unless the label on the interstate package which has been broken be reproduced on the retail package. We believe no grocer or druggist thus breaking an interstate package for a retail sale has understood this was necessary, and it is said this case is the first effort to apply the Federal Act in this way. If the 'holding for sale' is held to refer to all would-be sellers, no matter where or when or in what quantities, of all foods and drugs and cosmetics which at some time had moved in interstate commerce, the field of enforcement of the Act will be multiplied many times. The reason urged for so expanding it, to-wit: the protection of ultimate consumers, only makes another difficulty; for while Congress may regulate interstate commerce to any extent and almost for any purpose it thinks proper, this extended application would be really a direct regulation for police purposes of what is plainly intrastate commerce, which is the peculiar province of the State."

## Point II

**The Circuit Court of Appeals erred in failing to so construe Sec. 304 of the Act so as to exclude from the scope other words "at any time thereafter" proceedings against devices that are not inherently dangerous, are not illegal to possess and that had come to a permanent rest in the private home of the ultimate purchaser and consumer.**

The Circuit Court of Appeals held that it was immaterial that the Appellee had the article in his home; that he had paid for same—was satisfied with it and that the article was not inherently dangerous.

The purchase and possession of this article is not made unlawful. It cannot be compared to such outlawed objects as stolen goods, burglar tools, counterfeit coins, gambling paraphernalia, illicit liquor and the like, the possession of which may in some way be illegal and subject to seizure. Moreover, it is conceded that the article, as used, was not inherently dangerous or harmful to him or to anyone else.

No court has heretofore gone so far as to give such a broad scope to the Act which would make it possible for the Government to force its way into thousands of private homes of the ultimate purchasers and users and forcibly seize from their cupboards many kinds and varieties of drugs, devices and cosmetics that had at some previous time been shipped in interstate commerce

simply because they had been accompanied by false and misleading literature as to their therapeutic benefits. To give encouragement to the Federal agencies by the adoption of such construction of the Act would certainly lead to results never contemplated by Congress, and certainly not by the framers of the Constitution.

In this connection attention is called to the proceedings of a hearing held on April 11, 1947, before a subcommittee of the Committee on Agriculture, House of Representatives Eightieth Congress First Session on H.R. 1237, called the Federal Insecticide Act. Doctor Reed, Chief of the Insecticide Division, and Doctor Griffin, Assistant Chief, were testifying before the subcommittee presided over by Congressman Andresen as Chairman:

> "MR. REED: The suggestion we have made there is that the words 'in the original unbroken package' be added. We think that is necessary in order to make that part of the act workable.
>
> MR. GRIFFIN: The act as it stands at present would deny a person who received an insecticide in interstate commerce the privilege of breaking it up and selling it in smaller packages. He couldn't repack it or distribute it. He could only sell it in the registrant's package as it came. *The Solicitor's office informs us that they believe it would be going beyond the constitutional authority if we denied them that right. They believe that after a man has received the insecticide in interstate commerce he has a right to go ahead and repack it.*
>
> MR. ANDRESEN: That would come under, primarily, at least, under the jurisdiction of the

State authorities, too, after it has been received in interstate commerce?

MR. GRIFFIN: It should, yes.

MR. ANDRESEN: *So that the Federal Government would not necessarily have any jurisdiction over it after it reached its destination."*

While it is conceded that Congress is granted broad powers to regulate Commerce, it has no general powers to regulate for the promotion of the general welfare (*Carter v. Carter Coal Co.,* 298 U.S. 239).

## Point III

**Federal regulation and control of interstate commerce subject to limitations and guarantees of the Constitution.**

(a) RIGHT OF PRIVACY:

This is the first attempt ever made to forcibly break into a private home and forcibly seize therefrom an article for condemnation, which was not inherently dangerous to anyone, after it had reached the hands of the ultimate user.

In the recent decision of *Harris v. U. S.,* 91 L. Ed. 13, this court decided that an officer making an arrest in a private home, and armed only with a warrant of arrest was justified in seizing evidence of any crime that he may find upon the premises. This decision occasioned a wide cleavage in this court.

As pointed out by Justice Frankfurter in his dissenting opinion, that a series of decisions of this court, with only an occasional diviation, have construed the 4th Amendment liberally to safeguard the right of privacy, and the fact that the goods seized were contraband does not make valid or authorize unlawful search and seizure. (*Boyd v. United States supra,* 116 U.S. 616; *Agnello v. United States,* 269 U.S. 20; *United States v. Lefkowitz,* 285 U.S. 452; *Gobarth v. United States,* 285 U.S. 334; *Nathenson v. United States,* 290 U.S. 411).

As likewise therein pointed out by Justice Murphy:

> "The key fact of this case is that the search was lawless. A lawless search cannot give rise to a lawful seizure, even of contraband goods.
>
> "Never has it been suggested by the Court that law enforcement officers can use illegal means to seize that which it is unlawful to possess. To break and enter, to engage in unauthorized and unreasonable searches, to destroy all the rights to privacy in an effort to uproot crime may suit the purposes of despotic power, but those methods cannot abide the pure atmosphere of a free society."

And as also pointed out therein by Justice Jackson:

> "In view of the long abuse of search and seizure which led to the Fourth Amendment, I do not think it was intended to leave open an easy way to circumvent the protection it extended to the privacy of individual life. In view of the readiness of zealots to ride roughshod over claims of privacy for any ends that impress them as socially desireable, we should not make inroad on the rights protected by this Amendment."

The instant case presents a much more flagrant abuse of police powers because the United States Marshal invaded the home of a citizen who was not and could not be charged with the commission of any crime. Moreover, the goods seized could be lawfully used and purchased, and were not inherently dangerous or harmful to anyone. The only color of right that the United States Marshal had in breaking into the private home of your petitioner was based upon the Commerce clause of the Constitution, the grant of which was clearly exceeded by invading the home long after the interstate character of the article had ended and found permanent lodgment in your petitioner's home.

It will be noted that the libel proceedings filed by the Government was not verified by any person having knowledge of the facts, and failure of such verification, nullifies the warrant issued thereunder (*U. S. v. 8 Packages,* 5 Fed. (2d) 971). While this decision was challenged by the opinion in the case of *U. S. v. 935 Cases,* 136 Fed. (2d) 523, the opinion therein took careful pains to point out "that there is no element of search or invasion of the privacy of a citizen or of his home involved in the case at bar".

(b) THE RIGHT TO PROPERTY

Among the inalienable rights declared by our Constitution as belonging to each citizen is the right of acquiring and possessing property. For the Constitution to declare a right inalienable and at the same time leave to Congress unlimited power over it, would be to de-

stroy, not to conserve, the rights it vainly assumes to protect, thereby reducing the constitutional amendments to a form of words.

The Fifth Amendment to the Constitution of the United States declares that no person shall be deprived of his property without due process of law. The property in question was bought and paid for by the petitioner. It is not unlawful to possess same, even assuming that it had once been misbranded, it was not inherently or directly harmful or dangerous to him or to anyone else. Here the Government, simply on an initial process, breaks into a private home and forcibly seizes the machine for condemnation.

If it is upheld, the right to property in thousands of devices, drugs and cosmetics, notwithstanding that they are not inherently dangerous or harmful to the user, would be jeopardized if at any previous time, no matter how far in the distant past, such device, drug and cosmetic had been shipped in interstate commerce, with false or misleading representations as to its benefits.

## (c) THE RIGHT OF SELF TREATMENT WITHOUT GOVERNMENTAL INTERFERENCE

The late Justice Brandies stated that the makers of the Constitution conferred as against the Government the right to be "let alone", the most comprehensive of rights and the right most valued by civilized man.

It is conceded that the device purchased by the claimant was not inherently or directly dangerous or

harmful. The claimant's use of the machine in any way he may see fit, without coercion by the Government is his own prerogative, just as it is the right and prerogative of a Christian Scientist to attempt to effect a cure of his bodily ailments without medical interference.

The question here involved is not the merits of the spectro-chrome, or whether it is preferable to submit oneself to treatment by doctors practicing medicine and surgery, or by practitioners of Christian Science, or by the rays of a machine. The issue here is the sacred and fundamental right of an individual to follow whatever practitioner or method of self treatment he pleases.

So far as the claimant was concerned, he was satisfied with the results achieved by treating his ailments by the emanation of the rays of this machine. Certainly the Government should not deny him the right to its use, simply because it believes that it would be preferable that he submit himself to medical or surgical care.

The right of belief in any particular religion without molestation on account thereof is guaranteed to every one by the First Amendment of the United States Constitution, which specifically enjoins Congress from making any law respecting the establishment of religion or prohibiting the free exercise thereof. Would it be contended that the followers of Mary Baker Eddy in the method of treating their ailments by religious faith could be forced to accept the treatment of medical practitioners?

It might be refreshing to recall the words of Thomas Jefferson, who wrote as follows:

> "The state has no jurisdiction over the conscience of the subject, nor the right to intervene between that conscience and his God. The care of every man's soul belongs to himself, but what if he neglected the care of it; what if he neglected the care of his health or estate, which more nearly relates to the state, WILL THE MAGISTRATE MAKE A LAW THAT HE SHALL NOT BE POOR OR SICK? The laws provide against injury from others, but not from ourselves. God himself will not save men against their wills." (Young Jefferson by Claude Bower).

## CONCLUSION

To summarize the salient points in the case.

The machine or device had long since ceased to be a subject of interstate shipment. It had found permanent lodgment in the home of the claimant. It was his own private property—bought and paid for. The machine was not inherently dangerous. In its construction, it was not unlike thousands of other machines equipped with glass slides of different colors, radiating multicolored lights. It was clearly not injurious per se. It certainly could not, of its own physical operation, produce any direct physical injury to anyone. It was, according to the Government's own contention a useless piece of metal.

Regardless of the misleading or false printed statements, that accompanied the machine as to its efficacy

as a treatment and cure for certain diseases, the claimant believed and had faith that it could and did benefit his ailments. Whether the machine could be given credit therefor, or whether it was due to faith, or the power of suggestion, or to nature's own reservoir of healing powers in one's body, the fact remains that he was benefited by its use.

Upon no justifiable theory can the Government claim the right to invade his private home and take his private property away from him when that private property is not in and of itself directly injurious to him or to anyone else.

To the end that our citizens may be protected in their legal and constitutional rights; that Governmental agencies be enjoined and compelled to respect our Constitution as a living and virile document, your petitioner respectfully urges that a writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit so that this case may be determined by the Court and the decree of the Circuit Court of Appeals may be reversed by this Honorable Court and the decree of the District Court of the State of Oregon for the District of Oregon may be reinstated and affirmed.

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# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 230

WILLIAM R. OLSEN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 146–150) is reported at 161 F. 2d 669. The opinion of the district court (R. 23–24) is reported at 66 F. Supp. 754.

### JURISDICTION

The judgment of the circuit court of appeals was entered May 15, 1947 (R. 150). The petition for a writ of certiorari was filed July 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

### QUESTION PRESENTED

Whether a device misbranded when introduced in interstate commerce in violation of the Federal Food, Drug, and Cosmetic Act may be seized by judicial process from the home of the purchaser in a condemnation proceeding under Section 304 of the act.

### STATUTE INVOLVED

The pertinent provisions of the Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301, are as follows:

* * * * *

SEC. 201. For the purposes of this Act—

* * * * *

(h) The term "device" * * * means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

* * * * *

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of the containers or wrappers, or (2) accompanying such article.

* * * * *

SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or

misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: * * *

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. * * *

SEC. 502. A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

* * * * *

STATEMENT

In July 1945, the United States filed a libel of information, pursuant to Section 304 of the Federal Food, Drug and Cosmetic Act, in the United States District Court for the District of Oregon for the seizure and condemnation of a device designated as a Spectro-Chrome, which had been transported in interstate commerce from Newfield, New Jersey, to Portland, Oregon. The libel described the device sought to be seized as a cabinet with an opening in front through which the light from an electric bulb could shine through various

colored glass slides, and alleged that the label attached to the device falsely described it as "Spectro-Chrome Metry Measurement and Restoration of the Human Radio-Active and Radio-Emanative Equilibrium (Normalation of Imbalance) by Attuned Color Waves." The libel further alleged that the device was misbranded when introduced in interstate commerce in that the printed and graphic material shipped with the article falsely described it as a cure for all the diseases of man. (R. 2–8.)

A warrant of seizure was issued (R. 10–12), and the United States Marshal took possession of the device at petitioner's home (R. 12, 32–34). Petitioner appeared in the action as claimant and moved to quash the warrant and dismiss the proceedings (Pet. 26–27). The Government and petitioner entered into a stipulation by which it was conceded that the Spectro-Chrome was shipped in interstate commerce, that it was a device within the definition of Section 201 (h) of the Act, and that its labeling was false and misleading within Section 502 (a) of the Act (R. 41–42). There was reserved for trial the question of the jurisdiction of the court to seize the device from petitioner's home (R. 43).

At the trial, petitioner testified that he had had the machine at his home about a month before its seizure (R. 100–104), that he did not intend to sell it (R. 105), that he was satisfied with the

machine (R. 106), and that he found it helpful (R. 110–112).

The district judge found as a fact that the device was shipped in interstate commerce, and that when introduced in interstate commerce its labeling was false and misleading. He also found that the article was not inherently dangerous; that it was acquired by petitioner solely for use by himself and members of his family and that it was kept in his home without intent to sell. (R. 53–56.) The judge concluded that the machine had passed beyond the channels of interstate commerce and that the Government was not entitled to seize it from petitioner's home without his consent (R. 56–57). He accordingly dismissed the proceeding and ordered the device returned to petitioner (R. 58).

On appeal, the order of the district court was reversed (R. 150), the circuit court of appeals holding that, since the device had been misbranded at the time it was introduced in interstate commerce, it was subject to seizure under Section 304 of the Act, providing that an article misbranded when introduced in interstate commerce "shall be liable to be proceeded against while in interstate commerce, or at any time thereafter" (R. 146–150).

## ARGUMENT

The article here sought to be seized is concededly a device within the definition of Section

201 (h) of the act. It was concededly misbranded when introduced in interstate commerce within the meaning of Section 502 (a). It is not disputed that it could have been seized and condemned under Section 304 while it was in interstate commerce. Petitioner contends, however, that the power of seizure ceased when interstate transportation ended (Pet. 8–10) and, more particularly, that the power to condemn did not authorize seizure of the article at his home (Pet. 11–18).

1. That an article subject to condemnation under the Federal Food and Drug Act does not become immune from seizure merely because the interstate transportation of the article has come to an end was definitely decided by this Court under the 1906 Act in *Hipolite Egg Co.* v. *United States,* 220 U. S. 45. This Court there said in terms clearly applicable here, at pp. 57–58:

> The statute rests, of course, upon the power of Congress to regulate interstate commerce, and, defining that power, we have said that no trade can be carried on between the States to which it does not extend, and have further said that it is complete in itself, subject to no limitations except those found in the Constitution. We are dealing, it must be remembered, with illicit articles—articles which the law seeks to keep out of commerce, because they are debased by adulteration, and which law punishes them (if we may so express our-

selves) and the shipper of them. There is no denial that such is the purpose of the law, and the only limitation of the power to execute such purpose which is urged is that the articles must be apprehended in transit or before they have become a part of the general mass of property of the State. In other words, the contention attempts to apply to articles of illegitimate commerce the rule which marks the line between the exercise of Federal power and state power over articles of legitimate commerce. The contention misses the question in the case. There is here no conflict of national and state jurisdictions over property legally articles of trade. The question here is whether articles which are outlaws of commerce may be seized wherever found, and it certainly will not be contended that they are outside of the jurisdiction of the National Government when they are within the borders of a State. The question in the case, therefore is, What power has Congress over such articles? Can they escape the consequences of their illegal transportation by being mingled at the place of destination with other property? To give them such immunity would defeat, in many cases, the provision for their confiscation, and their confiscation or destruction is the especial concern of the law. The power to do so is certainly appropriate to the right to bar them from interstate commerce, and completes its purpose, which is not to prevent merely the physical movement of adulter-

> ated articles, but the use of them, or rather to prevent trade in them between the States by denying to them the facilities of interstate commerce. And appropriate means to that end, which we have seen is legitimate, are the seizure and condemnation of the articles at their point of destination in the original, unbroken packages. The selection of such means is certainly within that breadth of discretion which we have said Congress possesses in the execution of the powers conferred upon it by the Constitution. * * *

Section 10 of the 1906 Act, 34 Stat. 771, limited the power of seizure to articles remaining "unloaded, unsold, or in original unbroken packages." However, as the *Hipolite* decision indicates, that was a statutory and not a constitutional limitation. The principle is clear that articles validly banned from interstate commerce may be followed and condemned after interstate commerce has ended.[1]

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[1] The cases of *United States* v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453 (C. C. A. 9), certiorari denied February 10, 1947, No. 812, O. T. 1946, and *Sullivan* v. *United States*, 161 F. 2d 629 (C. C. A. 5), certiorari pending, No. 121, this Term, on which petitioner relies (Pet. 9–10) have no application to this case, since they involve the problem of the right to seize goods which first became adulterated or misbranded after interstate commerce may have come to an end. *Alberty* v. *United States*, 159 F. 2d 278 (C. C. A. 9), also cited by petitioner (Pet. 9), involved the question whether the misbranding "accompanied" the interstate shipment of the article within the meaning of section 201 (m). In the present case, it is conceded that the device was misbranded at the time that it was introduced in interstate commerce.

2. The issue in this case therefore narrows down to the question whether an article misbranded when introduced into interstate commerce, and therefore subject to forfeiture, acquires immunity from condemnation when it comes to rest in a private home. Nothing in the statute itself grants such an immunity. The statute specifically provides that an article is subject to seizure while in interstate commerce "or at any time thereafter," with no qualification. Petitioner in effect argues, however, that the Fourth and Fifth Amendments to the Constitution require that such an exception be read into the statute. He argues that to take the property from his home is to invade the right of privacy guaranteed by the Fourth Amendment and to deprive him of property in violation of the Fifth Amendment.

Petitioner's contentions, however, overlook the fact that the device here sought to be condemned came into his possession only through the violation of a concededly valid federal statute. The moment the article was introduced into interstate commerce in misbranded form it became an outlaw of commerce, an article whose confiscation or destruction is the special concern of the law. See *Hipolite Egg Co.* v. *United States, supra; McDermott* v. *Wisconsin,* 228 U. S. 115, 128. It thus became an article in the same class as lottery tickets, narcotics, illicit liquor, etc., an article subject to forfeiture, which could be taken by the Government wherever found. And since there is

no property right protected by the Constitution in articles made contraband by a valid law (see *Ziffrin, Inc.* v. *Reeves,* 308 U. S. 132, 140), the taking of the property was not a taking in violation of the Fifth Amendment.

Nor does the seizure of the property here violate any right guaranteed by the Fourth Amendment. Nothing in the Fourth Amendment prevents the United States from seizing contrabrand in a home or in any other place. As this Court said in the leading case of *Boyd* v. *United States,* 116 U. S. 616, 623, "The search for and seizure of stolen or forfeited goods * * * are totally different things from a search for and seizure of a man's private books and papers." The property taken was property which should never have come into petitioner's possession through interstate channels. It was taken through valid judicial process issued under a valid federal law.[2] The Fourth Amendment no more prohibits the execution of such process than it prohibits a levy of goods under a civil attachment. See *Boyd* v. *United States,* 116 U. S. 616, 624; *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272.

Petitioner's further contention that the taking of the machine deprived him of his liberty to use his own method of cure similarly ignores the basic fact that the article which he seeks to retain

[2] Petitioner speaks of forcible seizure of the article (Pet. 2, 13). The record shows, however, that the seizure was peacefully made pursuant to the warrant (R. 32–34).

is an article outlawed under a valid federal statute. He may use as a method of cure any device which he can properly obtain, but he cannot, on the basis of such right, retain an article which was shipped contrary to the provisions of a statute representing a proper exercise of the federal power over commerce. As this Court said in *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 320, involving the power of a State to enact a prohibition law:

> Whether the general authority includes the right to forbid individual use, we need not consider, since clearly there would be power, as an incident to the right to forbid manufacture and sale, to restrict the means by which intoxicants for personal use could be obtained, even if such use were permitted.

The seizure of any illicit food, drug, or device restricts the right of all those who would choose to use such article, but this is no valid objection. The liberty safeguarded under the Constitution is not an absolute or uncontrollable liberty; "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people." *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 391.

## CONCLUSION

The decision below is correct in holding that the seizure from a home of an article illegally

shipped in violation of the Federal Food, Drug and Cosmetic Act violates no constitutional rights. It represents merely the application to a particular set of facts of principles firmly established by the decisions of this Court. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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